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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996	)	CC Docket No. 98-146

REPLY COMMENTS OF SBC COMMUNICATIONS INC.

SBC COMMUNICATIONS INC.

JAMES D. ELLIS
ROBERT M. LYNCH
DURWARD D. DUPRE
DARRYL W. HOWARD

Their Attorneys

One Bell Plaza, Room 3703
Dallas, Texas 75202
(214) 464-4244

October 8, 1998

REPLY COMMENTS OF
SBC COMMUNICATIONS INC.

SBC Communications Inc., on behalf of itself and its subsidiaries (collectively, "SBC"), files these Reply Comments to address certain issues raised by commenters in their initial comments. Although the subject matter of this docket is section 706 and access to advanced telecommunications capability, many parties are attempting to expand this proceeding beyond that scope. Some seek to duplicate the advanced services rulemaking proceeding,[1] others attempt to use their comments as a substitute for petitions for rulemaking, and many raise issues pertinent to telecommunications services generally without any notable relationship to advanced telecommunications. The Commission is already faced with a large number of factual and policy matters on section 706; it should remain focused on advanced telecommunications capabilities and resist the attempts to transform this proceeding into one addressing any telecommunications, an even larger proceeding.

I. SECTION 706 IS A DEREGULATORY PROVISION THAT SHOULD NOT BE USED AS A BASIS FOR ADDING TO REGULATORY BURDENS

As SBC explained in its opening comments, the best way for the Commission to adhere to section 706(b)'s directive to "accelerate deployment of [advanced telecommunications] capability" is to provide incumbent LECs with relief from asymmetrical regulation in such areas as price caps, pricing, costing, and the tariff review process. See SBC Comments at 3. Those existing regulatory burdens reduce incumbents' incentives to invest in advanced facilities, and thus impede the achievement of section 706's central goal — the rapid availability of advanced

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[1] Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC

services to all Americans.

Accordingly, as GTE has properly emphasized in its comments, it is the Commission's own "burdensome and asymmetrical regulation of incumbent LECs" that is the "most serious obstacle to the ubiquitous deployment of advanced technology," and that should be the focus of this proceeding. GTE Comments at 13-14. The Commission's current regulatory approach is "wholly inconsistent with the goals of Section 706" and gives incumbents "little incentive to invest in advanced telecommunications capability." Id. at 14. Moreover, the approach serves no conceivable purpose because incumbent LECs have "no market power in providing [advanced] service[s]." Id. at 15.

Parties other than incumbent LECs have likewise highlighted this basic economic reality. To pick just one example, Comcast argues that the Commission should preempt certain State and local regulatory requirements because those regulatory burdens create disincentives to enter the advanced services market and thus "frustrate the goals of Section 706." Comcast Comments at 20. While SBC does not necessarily agree with Comcast's specific proposals — and certainly does not agree with any suggestion that relief from State and local regulation be limited to CLECs — it is significant that Comcast's argument proceeds from the same premise on which SBC has relied throughout: it is regulation itself that provides the most significant obstacle to deployment of advanced services capability.

Many parties also agree that, even if the Commission does not take advantage of this opportunity to engage in significant deregulation, at the very least it should not make matters worse by adding new regulatory burdens. As Time Warner has aptly explained, "[t]he last thing the Commission should consider in fulfilling its section 706 responsibility is the imposing [of]

new regulatory burdens." Time Warner Cable Comments at 6. Comcast has similarly explained that there is not "a strong case for regulatory intervention under Section 706." Comcast Comments at 11. And MediaOne Group has urged that "there is no need for the Commission to impose new regulation to promote investment in broadband infrastructure." MediaOne Group Comments at 3.

Unfortunately, however, some parties to this proceeding have suggested that the Commission move in precisely the opposite direction. These parties suggest that the Commission add a whole array of new regulatory requirements, many of which would fall exclusively on incumbent LECs. For the reasons we have discussed, such proposals are profoundly misguided as a matter of both law and policy. They will inhibit, not further, the availability of advanced telecommunications capabilities. These proposals should therefore be rejected. Although space and time constraints prevent SBC from addressing each of these arguments here, we do highlight a few proposals that, in addition to suffering from the basic flaw that they will discourage incumbent investment, are also improper for other reasons.

For instance, the Information Technology Association of America ("ITAA") argues that the Commission should create a whole new class of provider, a so-called Data Competitive Access Provider (or "D-CAP"), and place special and onerous burdens on incumbents in their dealings with this newly identified class of companies. ITAA Comments at 8-9. The granting of such privileged status to a select group of providers is rarely, if ever, appropriate, and it is especially improper in the current technological environment — an environment in which different technologies are increasingly converging to provide the same or similar services. See Notice ¶ 77 ("It may be . . . that as discrete industries and services begin to converge, the

application of different regulatory models to competing services will have effects on the marketplace."); see also Opening Statement of Commissioner Powell Before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation, 1998 FCC LEXIS 2764, at *7-*8 (June 10, 1998) ("[P]olicymakers would be well-advised to focus on regulatory and technical convergence."). Simply put, the Commission should not be in the business of picking the winners in the marketplace by providing ITAA's members with benefits unavailable to other companies. Cf. Notice ¶ 5 (pledging to "rely as much as possible on free markets and private enterprise to deploy advanced services").

Other parties seek to impose burdens that are properly considered, if at all, only in other proceedings. For example, several commenters[2] raise issues relating to the same unbundling and spectrum management issues that the Commission is currently considering in the context of the Notice of Proposed Rulemaking the Commission issued on the same day as the Notice. See NPRM ¶¶ 151-184. Considerations of orderly procedure and fundamental fairness require that these matters be addressed only in that separate proceeding.

Even further afield are some commenters' requests that the Commission use these proceedings to take action on matters having little, if anything, to do with advanced services. Commenters have raised a smorgasbord of issues on matters relating to everything from inside wiring to access to tenant customers to optical interconnection. See, e.g., Allegiance Telecom Comments at 14, 17; ALTS Comments at 18-20; AT&T Comments at 48-52. The matters properly before the Commission in this proceeding are significant and complex enough without

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[2] See, e.g., ADC Communications Comments at 19-20; ALTS Comments at 14-15; AT&T Comments at 6-9.

such attempts to inject extraneous issues, and there is no lack of alternative mechanisms for private parties to bring these unrelated matters to the Commission's attention. The Commission should maintain this proceeding's focus on advanced services issues, and it should reject these invitations to resolve every issue on some parties' regulatory wish lists.

II. ADEQUATE SAFEGUARDS ALREADY EXIST TO PREVENT DISCRIMINATION AGAINST INFORMATION SERVICE PROVIDERS

In the Notice, the Commission asked for comments on what measures, if any, were necessary to ensure that incumbent LECs do not discriminate against ISPs or in favor of their own information service provider operations. See Notice ¶ 38. In its initial comments, SBC demonstrated that the Computer III/ONA regime effectively precludes such discrimination. See SBC Comments at 10-12. SBC further explained that even if the Commission were to eliminate CEI requirements as it has proposed, this result would not change. See id. at 11.

The Internet Service Providers' Consortium ("ISP/C") challenges SBC's claims regarding the effectiveness of the existing Computer III/ONA regime. ISP/C argues that it is necessary to apply the Computer III safeguards not only to an incumbent LEC's operations, but also to any separate affiliates the ILEC creates (e.g., pursuant to the Commission's proposal in Docket 98-11) to provide advanced services. See ISP/C Comments at 8-10. This proposal is completely misguided. To the extent that an incumbent LEC creates a separate subsidiary to provide advanced services,[3] it is clearly unnecessary to subject this affiliate to additional regulatory safeguards. Any such requirement would in fact completely contravene the purpose of creating

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[3] As SBC has argued elsewhere, it does not believe that the separate subsidiary regime proposed in CC Docket 98-147 should be a prerequisite to advanced services deregulation. See Comments of SBC Communications Inc., CC Docket No. 98-147 (filed Sept. 25, 1998).

the separate subsidiary in the first place. As the Commission stated in CC Docket No. 98-147, the purpose of the separate subsidiary option is to place incumbents' advanced services affiliates "on the same footing as any of their competitors."[4] Full structural separation — which, by definition, places the affiliate on the same footing as third-party competitors — eliminates the need for any additional regulatory safeguards.

Moreover, the advanced services market is highly competitive. As ALTS, the CLEC trade association, has stated before the Commission, CLECs "were the first" to deploy high-speed data networks and "continue to deploy such advanced technologies at a dramatic pace."[5] They are "aggressively providing digital services throughout the nation," offering "advanced telecommunications capability to the public today," after having deployed their advanced networks "in hundreds of markets in only a few years' time."[6] Furthermore, cable companies and satellite carriers provide advanced services that compete directly with DSL services that CLECs and incumbent LECs provide.[7] This competition ensures that ISPs have numerous options for

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[4] Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 98-188, ¶ 86, CC Docket No. 98-147 (rel. Aug. 7, 1998).

[5] Petition of the Association for Local Telecommunications Services (ALTS) for a Declaratory Ruling Establishing Conditions Necessary to Promote Deployment of Advanced Telecommunications Capability Under Section 706 of the Telecommunications Act of 1996 at ii, CC Docket No. 98-78 (filed May 27, 1998).

[6] Id. at 4, 6, 9 (all emphasis added).

[7] Over 11 million (10 percent) of all U.S. homes already have access to high-speed cable modem service. The Commission, too, has noted that approximately 35 percent of all cable systems have been upgraded with hybrid-fiber coax ("HFC") network architecture, see Annual Assessment of the Status of Competition in the Market for the Deliver of Video Programming, Third Annual Report, 12 FCC Rcd 4358, ¶ 172 (1997), which is the principal upgrade needed to provide cable modem service. Hughes Electronics offers high-speed Internet access via DBS

reaching end users other than by relying on incumbents' networks.[8]

Two additional coalitions of Internet service providers — CIX and the Utah Independent ISPs — express concern over ILECs' ability to favor their affiliates unfairly in marketing advanced services. See CIX Comments at 18; Utah Coalition Comments at 3-5. To the extent that incumbent LECs choose to provide advanced services on an integrated basis, the Computer III regime contains sufficient safeguards against anti-competitive joint-marketing practices.[9] The Commission's CPNI rules require the Bell companies to make available to competing enhanced service providers, upon the request of a customer, virtually all information about that customer's use of basic network services that a BOC may acquire in providing those services. See Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer III), 104 F.C.C.2d 958, ¶¶ 260-265 (1986). Computer III further contains network disclosure rules designed to provide enhanced service providers with access to the technical information that they

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satellite to all U.S. households (particularly residential and rural ones) and small businesses with a line of sight to the equatorial sky. See Petition of Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell for Relief from Regulation, CC Docket 98-91, at 6-10 (filed June 9, 1998).

[8] ISP/C nevertheless argues that, even when DSL competition exists in a given market, ILECs' advanced services affiliates should be subjected to Computer III requirements because competitors are not likely to discipline the market. See ISP/C at 10. ISP/C claims that CLECs that are affiliated with ISPs will have the same "means and motive for anti-competitive behavior" as incumbent LECs. Id. ISP/C further claims that even CLECs that do not offer ISP services "may have good reason to keep its prices near RBOC/GTE rates." Id. Whatever the merits of ISP/C's conclusions about CLECs' incentives, this argument provides no basis for further regulation of ILECs. If anything, it provides a basis for regulating ILECs (or their affiliates) and CLECs in the same manner.

[9] To the extent that SBC opts to provide advanced services through the separate subsidiary model proposed in CC Docket No. 98-147, SBC will obviously comply with whatever joint-marketing restrictions the Commission adopts with respect to this subsidiary.

need about Bell companies' networks. See id. ¶¶ 246-254. These rules prevent Bell companies or their affiliates from introducing new offerings ahead of their competition.

As SBC has argued elsewhere,[10] the Commission should not unnecessarily restrict the joint marketing of basic and enhanced services. Joint-marketing restrictions interfere with the ability to provide consumers one-stop shopping for all of their telecommunications needs. Such restrictions also are inefficient and raise the costs, and hence the prices, of BOC information services. Incumbent LECs and their affiliates should be permitted to engage in the same kinds of joint marketing as other carriers, subject to the safeguards discussed above.

III. THE COMMISSION SHOULD REJECT SUGGESTIONS TO TAKE UNAUTHORIZED ACTIONS

Various parties suggest proposals that go far beyond the FCC's authority and are otherwise of questionable legality. For example, MCI wants the FCC to seize control of an ILEC central offices and loops, and give a third party administrator, created by the FCC, the right to assign and allocate those ILEC resources. MCI Comments at 31-32. Such an invasion would raise grave constitutional issues and violate at least one statute. See Government Corporation Control Act, 31 U.S.C.§ 9101, et seq. Other carriers complain to the FCC about the prices of unbundled network elements. See NorthPoint Comments at 4, 5. Per section 252, those prices have been set by either negotiation or by State commissions pursuant to arbitration. The Commission is without authority to modify those prices notwithstanding the complaints of carriers. Still others attempt to convince the Commission to attempt to use its authority under

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[10] See Comments of SBC Communications Inc. at 21-23, Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, CC Docket No. 95-20 (filed Mar. 27, 1998).

section 253 to preempt State laws that limit the legitimate activities of State and local governmental entities. See UTC Comments at 6-8, American Public Power Associates Comments at 30-33; Memorandum Opinion and Order, Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995, 13 FCC Rcd 3460 (1997). The Commission should summarily reject each of these invitations to act unlawfully.

More than a few commenters took the Notice as an opportunity to push agendas that involve requiring building owners to provide space on their premises for use by telecommunications carriers or cable companies. As noted earlier, those requests have only a tangential relationship with the provision of advanced telecommunications capability. They are aimed instead at telecommunications in general, and thus are outside the scope of this proceeding. The Commission also cannot lose sight of the fifth amendment implications of those suggestions, regardless of the merit it may believe any suggestion has.

Forcing property owners to suffer the physical occupation of their real estate has often been found to be a taking that must be both authorized and compensated. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), has particular application here and is especially instructive given its remarkable similarities with the proposals being made here. As described by the Supreme Court, "New York law provides that a landlord must permit a cable television company to install its cable facilities upon his property. In this case, the cable installation occupied portions of appellant's roof and the side of her building." Id. at 421. The facilities in question were used both to provide service to the building in question and to provide services to other buildings. Notably, the motive for the New York statute was "to facilitate

tenant access to CATV" (as well as apparently to obviate the need for cable companies to continue paying landlords more than a nominal amount for the space and for access). Id. at 423.

At issue was whether the placement of those facilities in and on a building owner's premises constituted a taking. Notwithstanding the public interest motives behind the New York law -- which the Court accepted -- the Supreme Court concluded that "when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred." Id. at 426. It did not matter to the Court whether the facilities were being used to provide service within the building or elsewhere -- each "permanently appropriate[d]" the owner's property and constituted a taking. Id. at 438. Requiring building owners to turn over portions of their property for carriers and cable companies would clearly also constitute a taking.

The Commission is unauthorized to affect such a taking, much less is it authorized to require such a physical occupation. In Bell Atlantic v. FCC, 24 F.3d 1441 (D.C. Cir. 1994), the Court determined that the Commission lacks the authority to require an incumbent LEC to accept the equipment of others to occupy LEC premises. Bell Atlantic stands today, as modified only by the subsequent statute that obligates incumbent LECs to provide physical collocation under certain circumstances and parameters, *see* 47 U.S.C. § 251(c)(6). Accordingly, the FCC is otherwise unauthorized to take any action that requires a building owner to provide a portion of its premises to a third party.

Respectfully submitted,

SBC COMMUNICATIONS INC.

By: Darryl W Howard/SAL

James D. Ellis
Robert M. Lynch
Durward D. Dupre
Darryl W. Howard

Attorneys for SBC Communications Inc.

One Bell Plaza, Suite 3703
Dallas, Texas 63101
(214) 464-4244

October 8, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of October, 1998, I caused copies of the Reply Comments of SBC Communications Inc. to be served upon the parties listed on the attached service list by first-class mail, postage prepaid.

Darryl W. Howard

ITS INC
1231 20TH STREET, NW
WASHINGTON, D.C. 20036

CAROL C HENDERSON
EXECUTIVE DIRECTOR
AMERICAN LIBRARY ASSOCIATION
WASHINGTON OFFICE
1301 PENNSYLVANIA AVE NW SUITE 403
WASHINGTON DC 20004

DAVID A IRWIN
MOULTRIE INDEPENDENT TELEPHONE COMPANY
IRWIN CAMPBELL & TANNENWALD
1730 RHODE ISLAND AVENUE NW
SUITE 200
WASHINGTON DC 20036-3101

HENRY GOLDBERG
W KENNETH FERREE
GOLDBERG GODLES WIENER & WRIGHT
COUNSEL FOR OPTEL INC
1229 NINETEENTH ST NW
WASHINGTON DC 20036

LAWRENCE G MALONE
GENERAL COUNSEL
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK
THREE EMPIRE STATE PLAZA
ALBANY NY 12223

L MARIE GUILLORY
NATIONAL TELEPHONE COOPERATIVE ASSOCIATION
2626 PENNSYLVANIA AVE NW
WASHINGTON DC 20037

RICHARD A BEVERLY
GENERAL COUNSEL
PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA
717 FOURTEENTH ST NW
WASHINGTON DC 20005

RUSSELL M BLAU
KATHLEEN L GREENAN
SWIDLER BERLIN SHEREFF FRIEDMAN LLP
3000 K STREET NW SUITE 300
WASHINGTON DC 20007

M ROBERT SUTHERLAND
MICHAEL A TANNER
BELLSOUTH CORPORATION
1155 PEACHTREE ST NE SUITE 1700
ATLANTA GA 30309

HOWARD J SYMONS
GIL M STROBEL
MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO
COUNSEL FOR CABLEVISION SYSTEMS CORP
701 PENNSYLVANIA AVE NW STE 900
WASHINGTON DC 20004-2608

ANDREA D WILLIAMS
CELLULAR TELECOMMUNICATIONS
INDUSTRY ASSOCIATION
1250 CONNECTICUT AVE NW
WASHINGTON DC 20036

DONALD WEIGHTMAN
COALITION OF UTAH INDEPENDENT INTERNET
SERVICE PROVIDERS
510 C STREET NE
WASHINGTON DC 20002

RONALD L PLESSER
MARK J OCONNOR
PIPER & MARBURY LLP
COUNSEL FOR
COMMERCIAL INTERNET eXchange
ASSOCIATION
1200 NINETEEN ST NW
WASHINGTON DC 20036

CHRISTOPHER W SAVAGE
COLE RAYWID & BRAVERMAN
COUNSEL FOR COMCAST
1919 PENNSYLVANIA AVE NW
SUITE 200
WASHINGTON DC 20006

GAIL L POLIVY
GTE SERVICE CORPORATION
1850 M STREET NW SUITE 1200
WASHINGTON DC 20036

SUSAN M EID
DAVID RUBASHKIN
MEDIAONE GROUP INC
1919 PENNSYLVANIA AVE NW
SUITE 610
WASHINGTON DC 20006

BRIAN CONBOY
THOMAS JONES
WILLKIE FARR & GALLAGHER
COUNSEL FOR TIME WARNER CABLE
THREE LAFAYETTE CENTRE
WASHINGTON DC 20036

ROBERT B MCKENNA
U S WEST INC
1020 19TH STREET NW
WASHINGTON DC 20036

STEVEN GOROSH
VICE PRESIDENT & GENERAL COUNSEL
NORTHPOINT COMMUNICATIONS INC
222 SUTTER STREET
SAN FRANCISCO CA 94108

STEPHEN N BROWN
DIRECTOR OF PUBLIC & TECHNOLOGY POLICY
NEW WORLD PARADIGN LTD
401 12TH STREET SOUTH STE 1421
ARLINGTON VA 22202

JONATHAN JACOB NADLER
BRIAN J MCHUGH
SQUIRE SANDERS & DEMPSEY LLP
COUNSEL FOR THE INFORMATION
TECHNOLOGY ASSOCIATION OF AMERICA
1201 PENNSYLVANIA AVE NW
WASHINGTON DC 20044

JEFFRY H SMITH
GVNW INC/MANAGEMENT
8050 SW WARM SPRINGS STREET SUITE 200
TUALATIN OR 97062

EMILY C HEWITT
GENERAL COUNSEL
GENERAL SERVICE ADMINISTRATION
1800 F STREET NW ROOM 4002
WASHINGTON DC 20405

KECIA BONEY
DALE DIXON
MCI COMMUNICATIONS CORPORATION
1801 PENNSYLVANIA AVE NW
WASHINGTON DC 20006

CATHERINE R SLOAN
DAVID N PORTER
RICHARD L FRUCHTERMAN III
WORLDCOM INC
1120 CONNECTICUT AVE NW STE 400
WASHINGTON DC 20036

MICHAEL S SLOMIN
BELL COMMUNICATION RESEARCH INC
445 SOUTH STREET MCC-1J30R
MORRISTOWN NJ 076960

JONATHAN JACOB NADLER
BRIAN J MCHUGH
SQUIRE SANDERS & DEMPSEY
1201 PENNSYLVANIA AVE NW
WASHINGTON DC 20044

MARK C ROSENBLUM
AVA B KLEINMAN
AT&T CORP
295 NORTH MAPLE AVENUE
ROOM 3252J1
BASKING RIDGE NJ 07920

BRAD E MUTSCHELKNAUS
JOHN J HEITMANN
KELLY DRYE & WARREN LLP
COUNSEL FOR e.spire COMMUNICATIONS INC
1200 19TH STREET NW
FIFTH FLOOR
WASHINGTON DC 20036

RILEY M MURPHY
EXECUTIVE VICE PRESIDENT
AND GENERAL COUNSEL
e.spire COMMUNICATIONS INC
133 NATIONAL BUSINESS PARKWAY
SUITE 200
ANNAPOLIS JUNCTION MD 20701

DAVID ELLEN ESQ
CABLEVISION SYSTEMS CORP
ONE MEDIA CROSSWAYS
WOODBURY NY 11797

WILLIAM J EVANS
PARSONS BEHLE & LATIMER
COUNSEL FOR CUIISP
ONE UTAH CENTER
201 OUSTH MAIN STREET
SUITE 1800
SALT LAKE CITY UT 45898

DONNA N LAMPERT
YARON DORI
MINTZ LEVEN COHN FERRIS
GLOVSKY AND POPEO
COUNSEL FOR MEDIA FUSION CORPORATION
WASHINGTON DC 20004-2608

DANA FRIX
KATHLEEN L GREENAN
SWIDLER BERIN SHEREFF FRIEDMAN
COUNSEL FOR PHONES FOR ALL INC
3000 K STREET NW STE 300
WASHINGTON DC 20007

TERRENCE J FERGUSON
SENIOR VICE PRESIDENT AND
SPECIAL COUNSEL
LEVEL 3 COMMUNICATIONS INC
3555 FARNAM STREET
OMAHA NE 68131

DAVID F FISHER
VICE PRESIDENT GENERAL COUNSEL
AND CORPORATE SECRETARY
ADC TELECOMMUNICATIONS INC
12501 WHITEWATER DRIVE
MINNETONKA MN 55343

ROBERT H GRIFFEN
BELL ATLANTIC CORP
1320 NORTH COURT HOUSE ROAD
EIGHTH FLOOR
ARLINGTON VA 22201

JOSEPH T GARRITY
SENIOR DIRECTOR
QWEST COMMUNICATIONS
555 17TH STREET
DENVER CO 80202

PETER A ROHRBACK
LINDA L OLIVER
HOGAN & HARTSON
COUNSEL FOR QWEST COMMUNICATIONS
CORPORATION
555 THIRTEENTH ST NW
WASHINGTON DC 20004

MARGOT SMILEY HUMPHREY
KOTEEN & NAFTALIN LLP
COUNSEL FOR TDS TELECOMMUNICATIONS
CORP
1150 CONNECTICUT AVENUE NW
SUITE 1000
WASHINGTON DC 20036

GEORGE VRADENBURG III
WILLIAM W BURRINGTON
AMERICA ONLINE INC
1101 CONNECTICUT AVENUE NW SUITE 400
WASHINGTON DC 20036

JONATHAN E CANIS
KELLEY DRYE & WARREN
COUNSEL FOR INTERMEDIA
COMMUNICATIONS
1200 NINETEENTH ST NW
FIFTH FLOOR
WASHINGTON DC 20036

MARGOT SMILEY HUMPHREY
KOTEEN & NAFTALIN
COUNSEL FOR NATIONAL RURAL TELECOM
ASSOCIATION
1150 CONNECTICUT AVENUE NW SUITE 1000
WASHINGTON DC 20036-4104

KATHRYN CLODFELTER
CRAWFORD COUNTY COMMUNITY NETWORK
6341 W NEWTON STEWARD RD
TASWELL IN 47175

LEON M KESTENBAUM
JAY C KEITHLEY
SPRINT CORPORATION
1850 M STREET NW SUITE 1110
WASHINGTON DC 20036

JIM WARNER
UNIVERSITY OF CALIFORNIA
CATS - COMM BLDG
SANTA CRUZ CA 95064

CARESSA D BENNET
GREGORY W WHITEAKER
BENNET & BENNET
1019 NINETEENTH ST NW STE 500
WASHINGTON DC 20036

MICHAEL L THEIS
KIESLING CONSULTING
6401 ODANA ROAD
MADISON WI 53719

ANDREW D LIPMAN
TAMAR E FINN
SWIDLER BERLIN SHEREFF FRIEDMAN
3000 K STREET NW SUITE 300
WASHINGTON DC 20007

JOSEPH W MILLER
WILLIAM COMMUNICATIONS INC
ONE WILLIAMS CENTER
SUITE 4100
TULSA OK 74102

LAURENCE E HARRIS
DAVID S TURETSKY
TELIGENT INC
8065 LEESBURG PIKE SUITE 400
VIENNA VA 22182

PHILIP L VERVEER
GUNNAR D HALLEY
WILLKIE FARR & GALLASHER
COUNSEL FOR TELIGENT INC
THREE LAFAYETTE CENTRE
1155 21ST ST NW
WASHINGTON DC 20036

JOHN G LAMB JR
NORTHERN TELECOM INC
2100 LAKESIDE BOULEVARD
RICHARDSON TEXAS 75081-1599

STEPHEN L GOODMAN
HALPRIN TEMPLE GOODMAN & SUGRUE
COUNSEL FOR
NORTHERN TELECOM INC
1100 NEW YORK AVENUE NW
SUITE 650 EAST TOWER
WASHINGTON DC 20005

PETER D KEISLER
MICHAEL DOSS
SIDLEY & AUSTIN
COUNSEL FOR AT&T CORP
1722 EYE STREET NW
WASHINGTON DC 20006

JAMES BALLER
SEAN STOKES
THE BALLER LAW GROUP PC
1820 JEFFERSON PLACE NW
SUITE 200
WASHINGTON DC 20036

ROBERT W MCCAUSLAND
VICE PRESIDENT REGULATORY AND
INTERCONNECTION
ALLEGIANCE TELECOM INC
1950 STEMMON FREEWAY SUITE 3026
DALLAS TX 75207-3118

LAWRENCE E SARJEANT
LINDA KENT
UNITED STATES TELEPHONE ASSOCIATION
1401 H STREET NW STE 600
WASHINGTON DC 20005

JOHN T LENAHAN
MICHAEL S PABIAN
AMERITECH
2000 WEST AMERITECH CENTER DRIVE
ROOM 4H82
HOFFMAN ESTATES IL 60196-1025

MITCHELL LAZARUS
FLETCHER HEALD & HILDRETH
COUNSEL FOR THE INTERNET SERVICE
PROVIDRES' CONSORTIUM
1300 NORTH 17TH ST 11TH FLOOR
ARLINGTON VA 22209

KATHRYN A KLEIMAN
INTERNET MATTERS
P O BOX 25876
ALEXANDRA VA 22313

WAYNE MOYERS
VICE PRESIDENT
WIRELESS INFORMATION NETWORKS FORUM
1200 19TH STREET NW SUITE 300
WASHINGTON DC 20036-2401

RANDALL B LOWE
J TODD METCALF
PIPER & MARBURY
COUNSEL FOR TRANSWIRE COMMUNICATIONS INC
1200 NINETEENTH ST NW
WASHINGTON DC 20036

JEFFREY L SHELDON
VICE PRESIDENT & GENERAL COUNSEL
UTC
1140 CONNECTICUT AVE NW
SUITE 1140
WASHINGTON DC 20036

MARY MCDERMOTT
CHIEF OF STAFF AND SENIOR VICE PRESIDENT GOVERNMENT RELATIONS
PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION
500 MONTGOMERY STREET
SUITE 700
ALEXANDRIA VA 22314

KATHLEEN L GREENAN
SWIDLER BERLIN SHEREFF FRIEDMAN
COUNSEL FOR WINSTAR COMMUNICATIONS
3000 K STREET NW
WASHINGTON DC 20007

TODD ATKIN
6011 W CONTADORA DR
WEST VALLEY CITY UT 84128

CHARLES A ELDERING
PROGRESS AND FREEDOM FOUNDATION
AND PRESIDENT
TELECOM PARTNERS LTD
900 TOWN CENTER
NEW BRITAIN PA 18901

JEFFREY A EISENACH
PRESIDENT
PROGRESS & FREEDOM FOUNDATION
1301 K STREET NW
SUITE 550 E
WASHINGTON DC 20005

ALAN MCCOLLOUGH
PRESIDENT & COO
CIRCUIT CITY STORES INC
9950 MAYLAND DRIVE
RICHMOND VA 23233

J0SEPH A GODLES
GOLDBERG GODLES WIENER & WRIGHT
COUNSEL FOR PANAMSAT CORPORATION
1229 NINETEENTH STREET NW
WASHINGTON DC 20036

W SCOTT MCCOLLOUGH
MCCOLLOUGH AND ASSOCIATES
COUNSEL FOR THE TEXAS INTERNET SERVICE PROVIDERS ASSOCIATION
1801 NORTH LAMAR SUITE 104
AUSTIN TX 78701

RONALD L PLESSER
JAMES J HALPERT
PIPER & MARBURY
COUNSEL FOR PSINET INC
SEVENTH FLOOR
1200 NINETEENTH ST NW
WASHINGTON DC 20036

HOWARD J SYMONS
MICHELL M MUNDT
MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO
COUNSEL FOR THE NATIONAL CABLE TELEVISION ASSOCIATION INC
701 PENNSYLVANIA AVE NW
SUITE 900
WASHINGTON DC 20004

DANIEL L BRENNER
NEAL M GOLDBERG
NATIONAL CABLE TELEVISION ASSOCIATION INC
1724 MASSACHUSETTS AVENUE NW
WASHINGTON DC 20036

CHARLES M BREWER
CHAIRMAN AND CHIEF EXECUTIVE OFFICER
MINDSPRING ENTERPRISES INC
1430 WEST PEACHTREE ST
SUITE 400
ATLANTA GA 30309

KEVIN TMPANE
ESTEHR H ROSENTHAL
FIRSTWORLD COMMUNICATIONS INC
9333 GENESEE AVENUE
SAN DIEGO CA 92121

JEFFREY BLUMENFELD
GLEN B MANISHIN
BLUMENFELD & COHEN -- TECHNOLOGY LAW GROUP
COUNSEL FOR RHYTHMS NETCONNECTIONS INC FIRSTWORLD COMMUNCIATIONS INC AND FIRST REGIONAL TELECOM
1615 M ST NW STE 700
WASHINGTON DC 20036

BRUCE KUSHNICK
EXECUTIVE DIRECTOR
NEW NETWORKS INSTITUTE
826 BROADWAY SUITE 900
NEW YORK NY 10003

JORDAN CLARK
PRESIDENT
UNITED HOMEOWNERS ASSOCIATION
655 15TH STREET NW SUITE 460
WASHINGTON DC 20005

CHERYL A TRITT
CHARLES H KENNEDY
MORRISON & FOERSTER
COUNSEL TO VERIO INC
2000 PENNSYLVANIA AVE NW
WASHINGTON DC 20006-1888

MAUREEN A LEWIS
GENERAL COUNSEL
ALLIANCE FOR PUBLIC TECHNOLOGY
901 15TH STREET NW SUITE 230
WASHINGTON DC 20038-7146

MARK A GRANNIS
EVAN R GRAYER
HARRIS WILTSHIRE & GRANNIS
1200 EIGHTEENTH STREET NW
WASHINGTON DC 20036

RICHARD J METZGER
EMILY M WILLIAMS
TELECOMMUNICATIONS SERVICES
888 17TH ST NW SUITE 900
WASHINGTON DC 20006

CYNTHIA S THOMAS
DIRECTOR, REGULATORY AFFAIRS
PERSONAL COMMUNICATIONS INDUSTRY
ASSOCIATION
500 MONTGOMERY STREET
SUITE 700
ALEXANDRIA VA 22314-1561

DOUGLAS E HART
FROST & JACOBS
COUNSEL FOR CINCINNATI BELL
TELEPHONE COMPANY
201 EAST FIFTH STREET
CINCINNATI OH 45202

PAUL J SINDERBRAND
ROBERT D PRIMOSCH
JONATHAN V COHEN
WILKINSON BARKER KNAUER &
QUINN
2300 N STREET NW
SUITE 700
WASHINGTON DC 20037

CARL K OSHIRO
COUNSELOR AT LAW
UNIVERSAL SERVICE ALLIANCE
100 FIRST STREET
SUITE 2540
SAN FRANCISCO CA 94105

PETER BRENNAN
FAIR TELECOM
163 THIRD AVENUE SUITE 251
NEW YORK NY 10003

ASHLEY C SCHANNAUER
ATTORNEY
INFORMATION RENAISSANCE
600 GRANT STREET
SUITE 2980
PITTSBURG PA 15219

LAWRENCE J SPIWAK
GENERAL COUNSEL
TECHNOLOGY ENTREPRENEUS COALITION
5335 WISCONSIN AVENUE NW
SUITE 440
WASHINGTON DC 20015

PAUL G MADISON
MICHAEL J FRANCESCONI
KELLEY DRYE & WARREN
1200 195TH STREET NW STE 500
WASHINGTON DC 20036

STUART POLIKOFF
DIRECTOR OF GOVERNMENT RELATIONS
OPASTCO
21 DUPONT CIRCLE NW
SUITE 700
WASHINGTON DC 20036

DAVID J NEWBURGER
NEWBURGER & VOSSMEYER
COUNSEL FOR CAMPAIGN FOR
TELECOMMUNICATIONS ACCESS
ONE METROPOLITAN SQUARE STE 2400
ST LOUIS MO 63102

UNABLE TO SERVE THE FOLLOWING DUE TO LACK OF MAILING ADDRESS ON PLEADINGS SUBMITTED TO FCC:

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